Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

EDDIE R. AURISPA, RAYMOND I. BARNES, SR., AND JAMES MIKUS,

Petitioners-Appellants,

v.

TEXAS DEPARTMENT OF COMMERCE, ANN RICHARDS, ALAN KAHN, RICHARD L. MOYA, CATHY BONNER, AND MARGARET DONALDSON, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITY,

Respondents-Appellees.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

May a federal appellate court affirm the exclusion of probative evidence in a First Amendment case by applying Rule 403, Fed. R. Evid., where the trial court did not exclude evidence on that basis nor undertake to weigh the probative versus prejudicial impact of the evidence?

II.

May a federal appellate court weigh the probative versus prejudicial impact of evidence and assume the discretion of the trial court in applying Rule 403, Fed. R. Evid., where the trial court did not weigh or exclude evidence on that basis?

III.

Is the Fifth Circuit's broad reading of its decision in *TERRELL V. UNIVERSITY OF TEXAS SYSTEM POLICE*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987) consistent with the requirements of Rule 403 of the Fed. Rule of Evid. and with this court's First Amendment jurisprudence?

IV.

May plaintiff's testimony concerning the political affiliation of persons terminated with him be excluded on the basis of Rule 602, Fed. Rules of Evid. where part of that proposed testimony is based on plaintiff's observation of those other persons at work on Republican Party functions and part on the declaration of party affiliation to plaintiff by those persons?

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Petitioners Eddie R. Aurispa, Raymond I. Barnes, Sr., and James Mikus request that this Honorable Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINIONS BELOW

The unpublished opinion of the district court (Attached, Appendix A) rendering judgment on the verdict for the defendants was affirmed on September 11, 1995 in an unpublished opinion by the United States Court of Appeals for the Fifth Circuit. (Attached, Appendix B). No Motion for Rehearing was filed.

JURISDICTION

The claims arise under 42 U.S.C. sec. 1983 for which jurisdiction in the federal court was proper under 28 U.S.C. sec. 1443. Petitioners seek review of the decision of the United States Court of Appeals for the Fifth Circuit and invoke the jurisdiction of this Court pursuant to 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Petitioners' claims are First Amendment claims deriving from this Court's decisions in *RUTAN V. REPUBLICAN PARTY OF ILLINOIS*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990) and *ELROD V. BURNS*, 427

U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976). Certain evidence in support of Petitioners' claims was barred from the jury by the trial court. The questions presented involve the Fifth Circuit's application of Rule 403, Fed. R. Evid. to affirm trial court evidentiary rulings made on other grounds.

Rule 403, Fed. R. Evid. states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

A question is also presented concerning the Fifth Circuit's application of Rule 602, Fed. R. Evid. to affirm the exclusion of other evidence in support of Petitioner's First Amendment claims.

Rule 602, Fed. R. Evid. states:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

STATEMENT OF THE CASE

In a panel decision, the Fifth Circuit finds on the basis of its decision in *TERRELL V. UNIVERSITY OF*

TEXAS SYSTEM POLICE, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987) that it may apply Rule 403, Fed. R. Evid. as a matter of law to support an evidentiary ruling of the trial court based on other grounds and made in the absence of the weighing of evidence and exercise of discretion required by Rule 403. The weighing of evidence and the discretionary authority granted a trial court by Rule 403 are undertaken by the Fifth Circuit.

The Fifth Circuit also affirms the exclusion of other evidence in support of Petitioners' *RUTAN* and *ELROD* claims in affirming the trial court's exclusion of that evidence on the basis of Rule 602, Fed. R. Evid., thus narrowly restricting evidence in support of Petitioners' claims.

STATEMENT OF FACTS

Petitioners are Republicans who were terminated from employment with the Texas Department of Commerce. Their employment was terminated shortly after the election of a Democratic governor by an appointee of the governor, and petitioners were replaced by Democrats. No policy or confidentiality exceptions are asserted or present to make those considerations relevant to the jobs. Thus, the claims are First Amendment claims. *RUTAN V. REPUBLICAN PARTY OF ILLINOIS*, 497 U.S. 62, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990); *BRANTI V. FINKEL*, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980); *ELROD V. BURNS*, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)

To support their First Amendment claims that they were terminated from employment because of their party affiliation, petitioners offered evidence that other Republicans were terminated from the agency at the same time petitioners were terminated. Two pieces of evidence were offered to support this fact.

One piece of evidence was a voter registration written summary reflecting the voting record of the other persons fired with petitioners. The other piece of evidence was the proposed testimony of Jim Mikus that (1) he had observed those other persons working on Republican Party functions and (2) that those other persons had told him that they were Republicans. These two pieces of evidence supporting plaintiff's *RUTAN* and *ELROD* claims were barred by the trial court. Without knowledge of this evidence the jury returned a verdict for defendants.

REASONS THIS COURT SHOULD GRANT RELIEF

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THERE APPEARS TO BE A CONFLICT AMONG THE CIRCUITS CONCERNING WHETHER RULE 403, FED. R. EVID. MAY BE APPLIED FOR THE FIRST TIME ON APPEAL TO AFFIRM AN EVIDENTIARY RULING OF THE TRIAL COURT MADE ON OTHER GROUNDS AND IN THE ABSENCE OF THE WEIGHING OF EVIDENCE AND EXERCISE OF DISCRETION REQUIRED BY THE RULE.

THE VOTER REGISTRATION WRITTEN SUMMARY

The trial court ruled that the written voter registration summaries purporting to reveal party affiliation of

other persons terminated with petitioners was not relevant. The Fifth Circuit finding that the voter summaries are relevant evidence, and that they were erroneously excluded from the jury by the trial court (Opinion p. 3) *weighs the probative versus prejudicial impact of that excluded evidence* finding the evidence *more prejudicial than probative*. The Fifth Circuit then rules, evidently as a matter of law, that the trial court could have reached this same conclusion and applied its discretion under the authority of Rule 403 had the trial court done so. (Opinion p. 3)

Rule 403 vests in the trial court the discretion to exclude probative evidence where after weighing the probative versus prejudicial value of the evidence on the record the trial court finds that the probative value of the evidence is substantially outweighed by its prejudicial impact on the trial. By this process, otherwise admissible evidence may be excluded from the jury's consideration where the *trial court* properly applies the *discretionary authority* vested in it by Rule 403.

Deference is due a trial court's Rule 403 weighing of the probative versus prejudicial effect of evidence. This deference is given to the trial judge "because of his or her involvement in the trial". *JOHNSON V. FORD MOTOR CO.*, 988 F.2d 573, 579 (5th Cir. 1993)

In the present case the trial court did not undertake to apply its discretionary authority under Rule 403. It ruled that evidence was irrelevant to Petitioners' case and for that reason not legally admissible. The Fifth Circuit, finding the trial court's rationale for exclusion error, affirms the trial court's exclusion on the basis that the

trial court *could have exercised its discretion under Rule 403 to exclude the admissible evidence.*

To reach this conclusion the Fifth Circuit must have undertaken to *weigh* the evidence to *determine* that the probative value of the evidence was *substantially outweighed* by its prejudicial impact. If it did not undertake this weighing then it affirms the exclusion of evidence under Rule 403 where no weighing of the evidence required by Rule 403 has been undertaken.

The scope of *discretion* to admit or refuse evidence under Rule 403 and *JOHNSON V. FORD MOTOR CO.*, 988 F.2d 573, 579 (5th Cir. 1993) is assumed by the Fifth Circuit.

The Fifth Circuit has established precedent for applying Rule 403 for the first time on appeal to affirm a decision of the trial court excluding evidence on another basis. See *FARACE V. INDEPENDENT FIRE INSURANCE CO.*, 699 F.2d 204, 210 (5th Cir. 1983); *MILLER V. UNIVERSAL STUDIOS, INC.*, 650 F.2d 1365, 1375 (5th Cir. 1981); *HARPRING V. CONTINENTAL OIL CO.*, 628 F.2d 406, 410 (5th Cir. 1980); *UNITED STATES V. MCGEE*, 572 F.2d 1097, 1099 (5th Cir. 1978) Other circuits have expressed reservations about applying the rule for the first time on appeal to affirm a trial court's exclusion of evidence on another basis and in the absence of the weighing required by the rule. See *UNITED STATES V. GREEN*, 786 F.2d 247, 252 (7th Cir. 1986); *UNITED STATES V. GARMAN*, 748 F.2d 218, 221 (4th Cir. 1984)

A number of circuit courts appear to generally approve the blanket application of Rule 403 to save an erroneous evidentiary ruling by the trial court. *UNITED*

STATES V. FOLEY, 871 F.2d 235, 238 (1st Cir. 1989) (Though trial court never specified grounds for excluding evidence, it would not have been an abuse of discretion to exclude it under Rule 403); *KUNZ V. UTAH POWER & LIGHT CO.*, 913 F.2d 599, 605 (9th Cir. 1990) (Court upholds exclusionary rulings by the trial court on the ground that the evidence could have been excluded under Rule 403); *ROCKWOOD INSURANCE CO. V. CLARK*, 713 F.2d 577, 579 (10th Cir. 1983) (Court need not review exclusion of evidence under Rule 408 where trial court could have relied on Rule 403).

This Court should grant certiorari to clear up the apparent conflict in the circuits and to clarify the proper application of Rule 403, Fed. R. Evid.

II. THE FIFTH CIRCUIT WAS IN ERROR IN APPLYING RULE 403, FED. R. EVID. TO SUPPORT AN EVIDENTIARY RULING BY THE TRIAL COURT MADE ON OTHER GROUNDS AND IN THE ABSENCE OF THE WEIGHING OF EVIDENCE AND EXERCISE OF DISCRETION REQUIRED BY THE RULE.

Rule 403 is designed to give a trial court discretion to exclude probative evidence in a case where it finds the probative character of the evidence substantially outweighed by its prejudicial impact on the trial. The trial court is given this authority because it is in a position to calculate probative versus prejudicial impact on the trial. *JOHNSON V. FORD MOTOR CO.*, 988 F.2d 573, 579 (5th Cir. 1993)

The Comment to Uniform Rule 45 says that "harmful abuse of discretion will be readily corrected on appeal." Unhappily, it must be reported that some of the most conspicuous abuses of Rule 403 discretion are to be found in appellate opinions. Too often these opinions treat Rule 403 as a grant of unfettered discretion to the trial judge – "great discretion" in the words of one such opinion – rather than as a rule requiring a careful balancing of factors so as to check discretion. *Worse yet is the use of discretion as a magic solvent for evidentiary issues on appeal. The unstated line of reasoning in this issue-ducking use goes something like this: the trial judge may have erred in excluding this evidence on grounds that it was hearsay, but since he could have excluded it under Rule 403 in any event, it is not necessary to discuss the hearsay error.*

This loose usage of Rule 403 by appellate courts is unfortunate for a number of reasons. First, it sets a bad example for trial courts whose method of exercising discretion is substantially more important than any appellate application of the rule. Second, if every challenged ruling of the trial judge is to be burdened beneath gobs of gooey discretion, it is difficult to see how we will ever have any of the "growth and development" of the law of evidence that is enjoined by Rule 102. Finally, such appellate treatment of discretion, because of its visibility, may discredit the concept even if trial judges are much more responsible in exercising discretion and ultimately lead to efforts to replace Rule 403 with something more like the mandatory rule that was originally proposed.

> It is to be hoped that more appellate opinions will begin to emphasize the importance of the balancing test in the application of Rule 403 or, better yet, demonstrate how it should be done. *They would do well to insist that Rule 403 cannot be relied on to support a ruling of the trial judge in cases where the trial judge did not purport to exercise discretion in excluding the evidence.*

22 Wright & Graham, FEDERAL PRACTICE AND PROCEDURE: Evidence Sec. 5223, pp. 316-17 (1990) (emphasis added)

Evidence supporting plaintiff's *RUTAN* and *ELROD* claims was barred from jury consideration. The Fifth Circuit in applying Rule 403 to affirm the trial court relies on its decision in *TERRELL V. UNIVERSITY OF TEXAS SYSTEM POLICE*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987) In *TERRELL* the Fifth Circuit reviewed a trial court ruling that the plaintiff's unpublished diary containing criticism of his employer involved protected First Amendment activity. The Fifth Circuit held that the diary did not implicate protected activity, and affirmed the trial court on this basis rather than the basis relied on by the trial court.

In *TERRELL* the court decided as a matter of law that the evidence could not support a First Amendment claim. If *TERRELL* is authority for the application of Rule 403 in the present case then the weighing required by Rule 403 and the discretionary authority granted by Rule 403 are null and void.

This reading of Rule 403 and *TERRELL* should not be allowed to evolve in the direction they are headed.

III. THE FIFTH CIRCUIT ERRED IN ITS RESTRICTION OF PETITIONERS' *RUTAN* AND *ELROD* EVIDENCE IN AFFIRMING THE EXCLUSION OF THE MIKUS TESTIMONY ON THE BASIS OF RULE 602, FED. R. EVID.

THE MIKUS TESTIMONY

In support of his *RUTAN* and *ELROD* First Amendment claims Mikus sought to testify that he had knowledge of the political affiliation of certain persons fired with him from the agency. The excluded Mikus testimony is divided into two parts: (1) that which Mr. Mikus observed (persons terminated with him from the Texas Department of Commerce working with him on Republican campaigns, fund raisers and other party activities) and (2) that which was told to him by those he was observing (that those persons are indeed Republicans).

The entirety of the testimony was barred on the theory that the testimony did not reflect the personal knowledge of Mr. Mikus. Rule 602, Fed. R. Evid. The Fifth Circuit affirms the trial court's ruling. (Opinion, pp. 4-5) The lack of personal knowledge by Mikus is said to reside in the fact that the statements to him by his co-workers "is inadmissible hearsay and insufficient to give him personal knowledge of the declarants' political affiliations." (Opinion, p. 4)

An objection to testimony under Rule 602 is an attack on the *reliability* of that testimony.

> When the witness proposes to testify to facts that he knows partly at first hand and partly from reports, the judge should admit or

> exclude that testimony according to the *reasonable reliability* of the evidence.

27 Wright & Gold, FEDERAL PRACTICE AND PROCEDURE: Evidence, Sec. 6022 nn.22-24, Sec. 6026 p. 227 n.11 (emphasis added); see also McCormick, Evidence, Cleary ed. 1984, Sec. 10.

To what extent can the statement of declarants that they are Republicans, especially when made in the context of their working on Republican Party campaigns and fund raisers, be said to be *unreliable*? Was there a doubt that the persons declaring themselves to be Republicans knew whether or not they are so affiliated? The testimony was not barred as hearsay under Rule 801, Fed. R. Evid. but that it was unreliable under Rule 602.

What is merely an erroneous ruling in a normal case is a dangerous ruling in a case like the present one.

This is a First Amendment case. The Mikus testimony was essential to support petitioners' *RUTAN* and *ELROD* claims that other persons fired with petitioners are Republicans, and that petitioners were fired *because of* their party affiliation. If probative evidence to support those claims can be excluded as it was in the present case then it puts in question the actual vitality of this Court's decisions in *RUTAN* and *ELROD*.

In *UNITED STATES V. VAN DORN*, 925 F.2d 1331, 1337-38 (11th Cir. 1991) the witness was allowed to testify to the defendant's connection with the Gambino crime family on the basis of the witness's having worked with the defendant and others on family business and on the basis of the defendant's reputation in the community

(learned from talking with third parties) concerning his association with the family.

According to *HALLQUIST V. LOCAL 276, PLUMBERS & PIPEFITTERS UN.*, 843 F.2d 18, 24 (1st Cir. 1988) " 'the *extent* of a witnesses' knowledge of matters about which he offers to testify goes to the weight rather than the admissibility of the testimony.' " *NIELSON V. ARMSTRONG RUBBER CO.*, 570 F.2d 272, 277 (8th Cir. 1978); see *M.B.A.F.B. FEDERAL CREDIT UNION V. CUMIS INS. SOC'Y, INC.*, 681 F.2d 930, 931 (4th Cir. 1982) Evidence is inadmissible under this rule only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testified to. 2 *J. WIGMORE, EVIDENCE*, Sec. 658 (J. Chadbourn Rev. 1979); 3 *J. WEINSTEIN & M. BURGER, WEINSTEIN's EVIDENCE*, SEC. 602[02] (1981)

The exclusion of evidence in the present case is clearly error. This court should grant certiorari to review this ruling.

CONCLUSION

These rulings by the Fifth Circuit are unnecessarily restrictive of evidence that may be offered in support of *RUTAN* and *ELROD* First Amendment claims. If this Court's decisions in *RUTAN* and *ELROD* are to have *actual vitality* the evidence foreclosed by the Fifth Circuit must be allowed. The thin and insupportable rationale for exclusion should be reviewed. This court should grant certiorari to review these decisions.

In addition the Court should grant certiorari to settle the law in the circuits regarding the appellate application of Rule 403, Fed. R. Evid. where no weighing of evidence nor exercise of discretion required by the rule has been undertaken by the trial court.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

EDDIE R. AURISPA, RAYMOND I. BARNES, SR. and JAMES MIKUS	§	
VS.	§	CIVIL NO. A-92-CA-168
TEXAS DEPARTMENT OF COMMERCE, ANN RICHARDS, ALAN KAHN, RICHARD L. MOYA, CATHY BONNER, and MARGARET DONALDSON, in their Individual and Official Capacity	§	(Filed Sep. 30, 1993)

JUDGMENT

On September 28, 1993, the jury in the above numbered and styled cause of action rendered a verdict wholly in favor of the Defendants.

ACCORDINGLY IT IS ORDERED, ADJUDGED AND DECREED that this Court hereby accepts the jury's verdict and makes it the JUDGMENT of the Court.

IT IS FURTHER ORDERED that all pending motions in the above numbered and styled cause are hereby TERMINATED AS MOOT.

SIGNED AND ENTERED this 30th day of SEPTEMBER, 1993.

/s/ James R. Nowlin
JAMES R. NOWLIN
UNITED STATES DISTRICT
JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 93-8769
Summary Calendar

Eddie R. Aurispa, et al.,

Plaintiffs-Appellants,

VERSUS

Texas Department of Commerce, et al.,

Defendants-Appellees

Appeal from the United States District Court
for the Western District of Texas
(A-92-CV-168)

(Filed Sep. 11, 1995)

Before HIGGINBOTHAM, DUHÉ, and EMILIO M. GARZA, Circuit judges. PER CURIAM:[1]

Plaintiffs Eddie R. Aurispa, Raymond I. Barnes, Sr., and James Mikus appeal the jury verdict in favor of defendants Texas Department of Commerce, Ann Richards, Alan Kahn, Richard L. Moya, Cathy Bonner, and

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Margaret Donaldson, in their individual and official capacities. Plaintiffs' sole contention on appeal concerns the propriety of the trial court's exclusion of three pieces of evidence. We affirm.

FACTS

In January 1991, Ann Richards, a Democrat, was sworn into office as Governor of Texas. At that time, plaintiffs, who are Republicans, were employees of the Texas Department of Commerce (TDOC). Shortly after her election, Governor Richards appointed an assigned the remaining named defendants, all of whom are Democrats, to high-level positions at TDOC. Subsequently, in the Spring of 1991, plaintiffs were terminated by TDOC allegedly as part of an agency reorganization. Plaintiffs sued under 42 U.S.C. §§ 1983 and 1985[2] claiming defendants violated their constitutional rights, including their First Amendment right of association, by predicating plaintiffs' terminations on their political affiliation. A jury decided in favor of the defendants. Plaintiffs appealed.

DISCUSSION

Plaintiffs contend the trial judge erred in excluding from evidence certain summaries of the voting records of

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[2] Plaintiffs also raised age discrimination claims in the district court. These claims were dismissed by the district court in an order entered on September 29, 1993 granting the defendants' oral motion for directed verdict. Plaintiffs do not urge error in these dismissals.

Travis County, Texas, that purported to reflect the political affiliations of other persons discharged by TDOC simultaneously with plaintiffs and testimony by plaintiff James Mikus that he had personal knowledge of these listed persons' political affiliations. Additionally, plaintiffs assert error in the trial court's refusal to allow plaintiffs to call as witnesses persons listed on the summaries.

1.) The summaries.

Federal Rule of Evidence 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Thus, the standard for relevance is a liberal one. *E.E.O.C. v. Manville Sales Corp.*, 27 F.3d 1089, 1093 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1252, 131 L.Ed.2d 133 (1995). Accordingly, the district court was probably incorrect in holding that the summaries were irrelevant. Nonetheless, assuming the summaries to be relevant, Federal Rule of Evidence 403 allows the exclusion of otherwise relevant evidence "if its probative value is substantially outweighed by the danger of . . . misleading the jury." The summaries purported to establish the political affiliation of the persons listed, when in fact the summarized information only indicated in which political primary these persons had most recently voted. Accordingly, the potential for these summaries to confuse the jury was a sufficient basis for their exclusion. When the judgment of the district court is ultimately correct, it may be affirmed on appeal for reasons other than those relied on by the district court. *Terrell v. University of Texas System Police*,

792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987).

2.) James Mikus's testimony.[3]

After exclusion of the summaries, Plaintiff Mikus attempted to testify that he had personal knowledge of the listed persons political affiliations. On voir dire examination following defendants' objection, Mikus admitted his knowledge resulted from seeing these persons at republican events and fund raisers, working with them on republican campaigns, and having discussions wherein they told him they were republicans.

Federal Rule of Evidence 602 provides that a witness is not competent to testify to a matter about which he does not have personal knowledge. Mikus's statement that these persons declared their affiliation to him is inadmissible hearsay and insufficient to give him personal knowledge of the declarants' political affiliations.

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[3] The relevant testimony was as follows:

Q. Were there a list – was their a group of people terminated in April from the Department of Commerce?

A. Yes, sir, there was.

Q. All right. Do you know the political affiliation from your own personal knowledge of those people terminated?

A. Yes, sir, I do.

Q. All right. And what was the political affiliation of those people from your personal knowledge?

A. From my personal knowledge – my personal knowledge, seventeen of the eighteen were republicans.

Tr. vol. 1, p. 91, lines 19-25 to p. 92, lines 1-3).

See Fed. R. Evid. 801 and 802; *United States v. Quezada*, 754 F.2d 1190 (5th Cir. 1985); *Elizarraras v. Bank of El Paso*, 631 F.2d 366 (5th Cir. 1980). "If the testimony on its face purports to be based on observed facts but is actually based on an out-of-court statement, the objection should be lack of personal knowledge." 27 Charles A. Wright & Victor J. Gold, Federal Practice and Procedure: Evidence § 6026, p. 225 (1990). Likewise, Mikus's observing the participation of these persons in republican events made him competent to testify about such participation, but he was not thereby competent to testify to the fact of their actual political affiliations. "Rule 602[, as opposed to Rule 701,] applies when the testimony on its face purports to relate facts but there is no showing that those facts are within the personal knowledge of the witness." 27 Wright & Gold, Evidence § 6022, p. 190. Thus, the trial court was correct in sustaining defendants' objection to Mikus's testimony based on his lack of personal knowledge.

3.) Refusal to allow witnesses.

Plaintiffs contend in this Court that the trial court refused to allow them to call as witnesses persons on the excluded summaries to prove those persons' political affiliations. This assertion by plaintiffs is without merit. In fact, the trial judge clearly informed plaintiffs' counsel that he could call the persons on the summaries and have them testify as to their political affiliations. (Tr. vol. 1, p. 102, lines 18-25 to p. 103, lines 1-13).

Plaintiffs, on the other hand, have misinterpreted the portion of the trial transcript upon which they rely in making this assertion of error. On redirect examination of

James Mikus.[4] Plaintiffs' counsel inquired into Mikus's associations with the other persons fired from TDOC "to establish an associational pattern under Rutan." (Tr. vol. 2, p. 66, line 23). At the time of defendants' objection to this testimony. Mikus had described his interactions with five persons. When counsel for plaintiffs indicated he had six more persons about whom to inquire, the court properly sustained defendants' objection to continuation of this testimony under Federal Rule of Evidence 403 as repetitious or needlessly cumulative.

Appellate courts show considerable deference to evidentiary rulings of the district court, reviewing them only for abuse of discretion. *Johnson v. Ford Motor Co.*, 988 F.2d 573, 579 (5th Cir. 1993). Accordingly, for the reasons stated above, we conclude the trial court did not abuse its discretion in making any of the evidentiary rulings about which plaintiffs complain.

For the foregoing reasons, the decision of the trial court is AFFIRMED.

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[4] See Tr. vol. 2, pp. 59-69.